

ORIGINAL

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 KEVIN C. MCMUNIGAL

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

KEVIN C. MCMUNIGAL,
 Plaintiff,

vs.

KATE E. BLOCH,
 Defendant.

CV 10 2765

CASE NO. 10 2765
 COMPLAINT FOR:
 DECLARATORY JUDGMENT-COPYRIGHT;
 PARTITION; DECLARATORY
 JUDGMENT-CONTRACT; BREACH OF
 CONTRACT-SPECIFIC PERFORMANCE AND
 DAMAGES; PROMISSORY ESTOPPEL;
 ESTOPPEL BY ACQUIESCENCE
 Judge:

Plaintiff Kevin C. McMunigal, by and through his attorney,
 Matthew B. Pavone, for his Complaint against Defendant Kate E.
 Bloch states and alleges as follows:

INTRODUCTION

This action arises from Defendant Bloch's breaches of two
 separate contracts: (1) a publication agreement with Plaintiff
 McMunigal and Aspen Publishers, Inc. ("Aspen") to create a legal
 casebook and (2) an agreement with Plaintiff McMunigal subsequent

FILE BY FAX

1 to publication of the casebook to separate as authors and divide
2 the casebook's materials (the "Separation Agreement"; Exhibit 1
3 hereto). Plaintiff and Aspen have made extensive efforts to find
4 a way for Plaintiff and Defendant to part ways as authors,
5 preserve the value of the materials each created, and avoid
6 litigation. Defendant's last minute repudiation of and attempt to
7 renegotiate the Separation Agreement, a primary purpose of which
8 was to avoid litigation regarding Defendant's breaches of
9 contract, now requires Plaintiff to seek an order from this Court
10 clarifying and enforcing his legal and equitable rights and
11 remedies.
12

13 **JURISDICTION AND VENUE**
14

15 1. Jurisdiction in this matter is founded upon both 28 USC
16 § 1332, because Plaintiff and Defendant are citizens of different
17 states and the matter in controversy exceeds seventy five
18 thousand dollars (\$75,000) exclusive of costs, interest and
19 attorneys fees, and 28 USC § 1331, because it raises federal
20 questions under the Copyright Act of 1976 as Amended, 17 USC §
21 101 et seq. of copyright ownership with supplemental jurisdiction
22 for state and common law claims pursuant to 28 U.S.C. § 1367.
23

24 2. Venue is appropriate in this Court pursuant to 28 U.S.C.
25 § 1391(a)(1) and (b)(1) since Defendant resides in the Northern
26 District of California.
27
28

THE PARTIES

3. Plaintiff Kevin C. McMunigal is the Judge Ben C. Green Professor of Law at Case Western Reserve University School of Law, 11075 East Boulevard, Cleveland, Ohio. Plaintiff is and was at all times relevant to this action a citizen of the State of Ohio.

4. Defendant Kate E. Bloch is Professor of Law at the Hastings College of the Law, 200 McAllister Street, San Francisco, California. Defendant, upon information and belief, is and was at all times relevant to this action a citizen of the State of California.

FACTUAL BACKGROUND

The Casebook

5. In 1999, Plaintiff and Defendant agreed to create a criminal law casebook and submitted a proposal for that casebook to Aspen.

6. On or about April 4, 2000, Plaintiff and Defendant entered a publication agreement with Aspen (the "Aspen Agreement"; Exhibit 2 hereto) to publish a casebook entitled *Criminal Law: A Contemporary Approach* (the "Casebook") and an accompanying teacher's manual.

7. Pursuant to the Aspen Agreement, the Casebook manuscript was due to be submitted on August 15, 2003.

1 8. Aspen scheduled publication of the Casebook for March 1,
2 2004, in time to sell the Casebook for use during the 2004-2005
3 academic year.

4 9. Plaintiff and Defendant divided responsibility for
5 creating various parts of the Casebook.

6 10. Plaintiff independently selected and edited cases,
7 statutes, jury instructions, and scholarly excerpts and wrote
8 original text, problems, and questions for his parts of the
9 Casebook. Plaintiff's parts of the Casebook are listed in the
10 Separation Agreement under "Part Three: McMunigal Sole Copyright
11 Materials."
12

13 11. Defendant likewise independently selected and edited
14 cases, statutes, jury instructions, and scholarly excerpts and
15 wrote original text, problems, and questions for her parts of the
16 Casebook. Defendant's parts of the Casebook are listed in the
17 Separation Agreement under "Part Two: Bloch Sole Copyright
18 Materials."
19

20 12. Aspen collected and edited Plaintiff's and Defendant's
21 parts and published them as the Casebook.

22 13. Defendant's delays and other breaches of the Aspen
23 Agreement, described in the following Paragraphs, forced Aspen to
24 delay publication of the Casebook until April 29, 2005, over a
25 year after the originally scheduled publication date.
26
27
28

1 14. On January 11, 2004, partway through the copyediting
2 process, Defendant stopped the copyediting on the Casebook for a
3 period of eight months.

4 15. For many months following January 11, 2004, Defendant
5 refused to commit to a time frame for resuming copyediting work
6 on the Casebook.

7 16. Copyediting on the Casebook did not resume until
8 September 7, 2004.

9 17. During 2004 and 2005, Defendant frequently failed to
10 inform Plaintiff and Aspen when she would finish and submit her
11 work for the Casebook to Aspen.

12 18. During 2004 and 2005, Defendant frequently failed to
13 submit her work for the Casebook to Aspen in timely fashion.

14 19. Paragraph 3 of the Aspen Agreement requires Plaintiff
15 and Defendant to obtain permissions for copyrighted items
16 selected for use in the Casebook.

17 20. Defendant failed to obtain necessary copyright
18 permissions for items she had selected for her parts of the
19 Casebook, forcing Aspen to take over this task in December of
20 2004.

21 21. At the time of publication, Aspen held sole copyright to
22 the materials collected in the Casebook, as required by the Aspen
23 Agreement.

The Teacher's Manuals

22. A teacher's manual published in timely fashion is critical to the success of a casebook. Accordingly, the Aspen Agreement required Plaintiff and Defendant to write a teacher's manual for the Casebook and to submit the teacher's manual manuscript by January 1, 2004.

23. Aspen scheduled the teacher's manual to be published at the same time as the Casebook, on or about March 1, 2004, to be available for prospective adopters of the Casebook to review and for Aspen's sales staff to use in promoting sales of the Casebook.

24. Customary practice in legal publishing is for multiple casebook authors to produce a single teacher's manual for a casebook. It is also customary practice in legal publishing for a casebook's authors to divide the writing of a single teacher's manual, with each author writing the parts of the teacher's manual that correspond to that author's parts of the casebook.

25. The Aspen Agreement contemplated the customary practice of Plaintiff and Defendant writing a single teacher's manual for the casebook and dividing the work so that Plaintiff and Defendant would each write the parts of a single teacher's manual that corresponded to their parts of the Casebook.

26. To avoid delay and redundancy, Aspen and Plaintiff proposed that Plaintiff and Defendant follow the customary practice of dividing the writing of a single teacher's manual

1 between them, with Plaintiff and Defendant each writing the parts
2 of the teacher's manual corresponding to their parts of the
3 Casebook.

4 27. In the Spring of 2005, after the Casebook was published,
5 Defendant informed Plaintiff and Aspen that she would not follow
6 the customary practice of dividing the writing of a single
7 teacher's manual between herself and Plaintiff, instead insisting
8 she write her own separate teacher's manual for the entire
9 Casebook.
10

11 28. During the Summer and Fall of 2005, Defendant failed to
12 inform Aspen and Plaintiff when she would finish and submit her
13 teacher's manual chapters to Aspen.

14 29. During the writing of the teacher's manuals and at all
15 times since the Summer of 2005, Defendant has refused to speak
16 with Plaintiff either on the telephone or in person.
17

18 30. Aspen collected Plaintiff's and Defendant's teacher's
19 manuals and published them in a single volume, with Plaintiff's
20 teacher's manual labeled "Part I" and Defendant's teacher's
21 manual labeled "Part II."
22

23 31. Defendant's delays and other contractual breaches,
24 described in the previous Paragraphs, forced Aspen to delay
25 publication of the teacher's manuals until March of 2006, almost
26 a year after the Casebook was published and nearly two years
27 after the originally scheduled publication date for the teacher's
28 manual.

1 32. Defendant's insistence on Defendant and Plaintiff writing
2 separate teacher's manuals caused the published teacher's manuals
3 to be unavailable in 2005 to potential adopters of the Casebook
4 and unavailable for Aspen's sales staff to use in marketing the
5 Casebook for the 2005-2006 academic year, damaging sales of the
6 Casebook.

7
8 33. Defendant's insistence on Defendant and Plaintiff writing
9 separate teacher's manuals also caused the published teacher's
10 manuals to be unavailable for use by teachers who adopted the
11 book for courses during the 2005-2006 academic year, damaging
12 sales of the Casebook.

13 34. As a result of Defendant's delays and other breaches of
14 the Aspen Agreement regarding the Casebook and the teacher's
15 manuals, Aspen decided not to publish a revised edition of the
16 Casebook and advised Plaintiff and Defendant of this decision by
17 letter of July 8, 2008. (Exhibit 3 hereto.)

18
19 35. Plaintiff holds sole copyright to the teacher's manual he
20 wrote.

21 36. Defendant Bloch holds sole copyright to the teacher's
22 manual she wrote.

23 **The Separation Agreement**

24
25 37. After the delayed publication of the teacher's manuals
26 in March of 2006, Plaintiff, Aspen, and Defendant began
27 discussions of Plaintiff and Defendant separating as authors and
28

1 dividing the materials collected in the Casebook between them
2 according to authorship.

3 38. To accomplish this separation and division, and to
4 settle claims based on Defendant's contractual breaches,
5 Plaintiff and Defendant exchanged contract offers, counter-
6 offers, and acceptances from May through November of 2007.

7
8 39. On August 6, 2007, for example, Defendant sent Plaintiff
9 a counter-offer in which she stated "Thank you for organizing the
10 remaining issues so that we can move forward in the book division
11 process. . . . " and "I agree with the concept of having the
12 rights to our exclusive materials revert to each of us solely and
13 separately and to finding a way of sharing the rights to the
14 shared materials."

15
16 40. On November 13, 2007, Plaintiff and Defendant reached
17 final agreement to separate as authors, to divide the Casebook,
18 and to recognize that each holds sole copyright to their
19 respective parts of the Casebook when Plaintiff agreed to all
20 remaining conditions set forth in Defendant's prior counteroffer
21 and accepted that counteroffer.

22 41. During the exchange described in Paragraph 38, above,
23 Plaintiff and Defendant jointly created the Separation Agreement
24 and Defendant extensively revised and added to the Separation
25 Agreement's terms and language.

26
27 42. The essential terms of the Separation Agreement are that
28 Plaintiff and Defendant agree: (1) to separate as authors; (2)

1 to divide the Casebook's materials according to authorship; (3)
2 that Defendant holds sole copyright to her parts of the Casebook,
3 listed in Part Two of the Separation Agreement; (4) that
4 Plaintiff holds sole copyright to his parts of the Casebook,
5 listed in Part Three of the Separation Agreement; and (5) that
6 Plaintiff and Defendant hold joint copyright to the parts of the
7 Casebook they created together, listed in Part One of the
8 Separation Agreement.
9

10 **Defendant Bloch's Repudiation of the Separation Agreement**

11 43. On November 9, 2007, Aspen offered Defendant and
12 Plaintiff each new contracts for new and separate criminal law
13 casebooks based on each author's parts of the Casebook.
14

15 44. The offers were conditioned on (1) Plaintiff and
16 Defendant finalizing their agreement to separate as authors and
17 to divide the Casebook's materials by November 30, 2007 and (2)
18 Plaintiff and Defendant submitting separate new book proposals to
19 Aspen. Aspen set a November 15, 2007 deadline for Plaintiff to
20 submit a new book proposal and a November 19, 2007 deadline for
21 Defendant to submit a new book proposal.
22

23 45. On November 12, 2007, Plaintiff submitted a book
24 proposal to Aspen for a new criminal law casebook in response to
25 Aspen's November 9, 2007 offer.
26

27 46. After reviewing Plaintiff's proposal, Aspen agreed to
28 publish a new criminal law casebook by Plaintiff conditioned on

1 Defendant and he executing a formal memorialization of the
2 Separation Agreement.

3 47. Based on information and belief, Defendant did not
4 submit a book proposal to Aspen for a new criminal law casebook
5 by the November 19, 2007 deadline set by Aspen or at any time
6 thereafter.

7
8 48. On November 23, 2007, Defendant, in an email sent to
9 Plaintiff and Aspen, expressly repudiated the Separation
10 Agreement.

11 49. Since November 23, 2007, Defendant has refused to
12 execute a formal memorialization of the Separation Agreement.

13 50. Due to Defendant's repudiation and continuing breach of
14 the Separation Agreement, Aspen is currently unwilling to publish
15 a new criminal law casebook by Plaintiff.

16
17 COUNT I

18 **DECLARATORY JUDGMENT - COPYRIGHT**

19 51. Plaintiff McMunigal incorporates by reference paragraphs 1
20 through 50, above.

21 52. By letter of July 8, 2008, Aspen notified Plaintiff and
22 Defendant that it was transferring to Plaintiff and to Defendant
23 the copyright to the Casebook's materials for future editions.

24 53. Plaintiff and Defendant jointly created items comprising
25 approximately 3 pages of the 998 pages in the Casebook. In Part
26 One of the Separation Agreement Plaintiff and Defendant listed
27 these items and acknowledged their joint creation.
28

1 54. Plaintiff claims that Plaintiff and Defendant hold
2 joint copyright to the items they listed in Part One of the
3 Separation Agreement, as acknowledged by Defendant in creating
4 the Separation Agreement.

5 55. Defendant independently selected, edited and wrote
6 substantial parts of the Casebook. In Part Two of the Separation
7 Agreement, Plaintiff and Defendant listed her parts of the
8 Casebook and acknowledged Defendant's independent selection,
9 editing and writing of them and her entitlement to sole copyright
10 to them.

11 56. Plaintiff claims that Defendant holds sole copyright to
12 her parts of the Casebook listed in Part Two of the Separation
13 Agreement, as Defendant acknowledged in creating the Separation
14 Agreement but now denies.

15 57. Plaintiff independently selected, edited and wrote
16 substantial parts of the Casebook. In Part Three of the
17 Separation Agreement, Plaintiff and Defendant listed his parts of
18 the Casebook and acknowledged Plaintiff's independent selection,
19 editing and writing of them and his entitlement to sole copyright
20 to them.

21 58. Plaintiff registered sole copyright to his parts of the
22 Casebook, listed in Part Three of the Separation Agreement, and
23 the United States Copyright Office issued a Certificate of
24 Registration, Number TX 6-935-559 (Exhibit 4 hereto), to him as
25 sole author and claimant of the copyright to his parts of the
26 Casebook.

27 59. Plaintiff claims that he holds sole copyright to his
28 parts of the Casebook listed in Part Three of the Separation

1 Agreement, as Defendant acknowledged in creating the Separation
2 Agreement but now denies.

3 60. Whether the Casebook is a collective work, and the
4 status of and ownership of the copyright to the materials in the
5 Casebook upon Aspen's July 8, 2008 transfer of the copyright to
6 Plaintiff and to Defendant, constitute justiciable federal
7 questions under copyright law.

8 61. Plaintiff claims that the Casebook is a collective work,
9 apart from the three pages described in Part One of the
10 Separation Agreement.

11 62. Plaintiff is now unable to enter a contract for future
12 publication of his parts of the Casebook without declaratory
13 clarification by this Court that he holds sole copyright to his
14 parts of the Casebook.

15 63. Pursuant to 28 U.S.C. Section 2201, Plaintiff
16 respectfully asks this Court to declare the rights and legal
17 obligations of the parties with respect to copyright to the
18 materials collected in the Casebook.

19 WHEREFORE, Plaintiff respectfully requests that this Court
20 enter a judgment declaring that Plaintiff holds sole copyright to
21 the materials to which he has registered the copyright and that
22 are listed in Part Three of the Separation Agreement, that
23 Defendant holds sole copyright to the materials listed in Part
24 Two of the Separation Agreement, and that Plaintiff and Defendant
25 hold joint copyright to the materials listed in Part One of the
26 Separation Agreement.
27
28

COUNT II

PARTITION

64. Plaintiff incorporates by reference Paragraphs 1 through 63, above.

65. If the Court finds under Count I, above, that the Casebook is a joint work rather than a collective work, and that therefore Plaintiff and Defendant hold joint copyright to all of Casebooks materials, Plaintiff seeks partition of that joint copyright pursuant to California Code of Civil Procedure § 872.210.

66. The subject of this partition action is the copyright to the materials in the Casebook.

67. Plaintiff is a co-owner as tenant in common of the copyright to the materials in the Casebook.

68. Defendant Bloch is a co-owner as tenant in common of the copyright to the materials in the Casebook.

69. Plaintiff and Defendant are the only owners of the copyright to the materials collected in the Casebook.

70. Plaintiff seeks equitable partition of the copyright to the materials collected in the Casebook between Plaintiff and Defendant granting Plaintiff sole copyright to his parts of the Casebook, listed in Part Three of the Separation Agreement, and granting Defendant sole copyright to her parts of the Casebook listed in Part Two of the Separation Agreement.

1 71. Plaintiff requests that the partition sought herein be
2 accomplished by this Court entering an order directing Defendant
3 Bloch to execute a memorialization of the Separation Agreement.

4 COUNT III
5 **DECLARATORY JUDGMENT- SEPARATION AGREEMENT**

6 72. Plaintiff incorporates by reference Paragraphs 1
7 through 71, above.

8 73. Plaintiff and Defendant entered the Separation Agreement
9 as described in Paragraphs 37 through 42.

10 74. The Separation Agreement constitutes a valid contract
11 concerning the separation of Plaintiff and Defendant as authors
12 and division of the copyright to the materials in the Casebook.

13 75. All offers, counteroffers, and acceptances by Plaintiff
14 and Defendant creating and constituting the Separation Agreement
15 are in writing since they took place through emails and documents
16 attached to emails.

17 76. If the Court finds under Count I, above, that the
18 Casebook is a joint work rather than a collective work, and that
19 therefore Plaintiff and Defendant hold joint copyright to all of
20 the Casebook's materials, then by and through the Separation
21 Agreement Plaintiff and Defendant agreed to transfer and did
22 transfer their ownership interests to each other as reflected in
23 Part Two and Part Three of the Separation Agreement.

24 77. Pursuant to Rule 65 and 28 USC § 2201, Plaintiff asks
25 this Court to declare that there exists an enforceable division
26
27
28

1 of the copyright to the Casebook's materials by contract between
2 Plaintiff and Defendant and that the copyright to the Casebook's
3 materials have been divided as set forth in the Separation
4 Agreement.

5 WHEREFORE, Plaintiff respectfully requests that this Court
6 enter a judgment declaring (1) that the Separation Agreement is a
7 valid and legally enforceable contract between Plaintiff and
8 Defendant obligating Defendant to separate from Plaintiff as an
9 author and to divide the materials in the Casebook according to
10 the terms of the Separation Agreement; and (2) that under the
11 terms of the Separation Agreement Plaintiff holds sole copyright
12 to the materials listed in Part Three of the Separation
13 Agreement, that Defendant holds sole copyright to the materials
14 listed in Part Two of the Separation Agreement, and that
15 Plaintiff and Defendant hold joint copyright to the materials
16 listed in Part One of the Separation Agreement.

17
18
19 **COUNT IV**

20
21 **SPECIFIC PERFORMANCE OF SEPARATION AGREEMENT**

22 78. Plaintiff incorporates by reference Paragraphs 1 through
23 77, above.

24 79. The Separation Agreement is fair to both Plaintiff and
25 Defendant, and the consideration clearly sufficient in that the
26 Separation Agreement gives each party (a) sole copyright to the
27 substantial parts of the Casebook each independently created, (b)
28

1 joint copyright to the approximately 3 pages of materials they
2 jointly created, (c) sole copyright to approximately equal parts
3 of the Casebook and (d) the opportunity to preserve the value of
4 the substantial materials each independently created by
5 publishing them in separate future works.

6
7 80. Failure to enforce the Separation Agreement would be
8 unfair to Plaintiff since it was Defendant Bloch's delays and
9 other contractual breaches that caused the parties to separate as
10 authors and divide the Casebook's materials.

11 81. Failure to enforce the Separation Agreement would be
12 unfair to Plaintiff since it was Defendant Bloch's delays and
13 other contractual breaches, as well as her last minute
14 repudiation of the Separation Agreement, that cost both parties
15 the opportunities to publish new separate Casebooks with Aspen.

16
17 82. Failure to enforce the Separation Agreement would be
18 unfair to Plaintiff since it would allow Defendant to hold
19 Plaintiff and his parts of the Casebook hostage by threatening
20 the future value of the approximately 500 pages of materials
21 Plaintiff spent several years creating as well as the future
22 value of Plaintiff's teacher's manual.

23
24 83. Performance by Defendant of the terms of the Separation
25 Agreement is neither oppressive nor unconscionable since she
26 played a substantial role in creating the Separation Agreement.

27 84. The terms of the Separation Agreement are certain and
28 unambiguous.

1 85. Plaintiff has performed all obligations of the
2 Separation Agreement required of him thus far and Plaintiff
3 remains ready and willing to perform his obligations under the
4 Separation Agreement and to execute a formal memorialization of
5 it.

6
7 86. The Separation Agreement is capable of enforcement
8 without further supervision by the Court through a decree of this
9 Court ordering Defendant to execute a formal memorialization of
10 the Separation Agreement.

11 87. Plaintiff has no adequate remedy at law.

12 WHEREFORE, Plaintiff respectfully requests judgment against
13 Defendant granting specific enforcement of the Separation
14 Agreement and ordering Defendant to execute a formal
15 memorialization of the Separation Agreement.

16
17 COUNT V

18 **PROMISSORY ESTOPPEL**

19 88. Plaintiff incorporates by reference Paragraphs 1 through
20 87, above.

21 89. During negotiation of the Separation Agreement,
22 Defendant promised to separate from Plaintiff as an author and
23 divide the Casebook's materials between Plaintiff and Defendant.

24 90. Defendant's promise and other actions led Plaintiff
25 reasonably to believe that Defendant would separate from
26 Plaintiff as an author and divide the Casebook's materials
27 between Plaintiff and Defendant.

1 91. Defendant's promise and other actions led Plaintiff and
2 Aspen reasonably to believe, as Aspen stated in a November 2,
3 2007 email to Plaintiff and Defendant, that "the two of you will
4 not be working together on a second edition of your criminal law
5 casebook."

6 92. Defendant knew that Aspen had offered Plaintiff a
7 contract for a new casebook and that this offer was conditioned
8 on Plaintiff submitting a new book proposal to Aspen by
9 November 15, 2007.

10 93. In reasonable reliance on Defendant's promise and other
11 actions, Plaintiff recruited another law professor to work with
12 him on a new criminal casebook and wrote a detailed proposal for
13 that new criminal law casebook.

14 94. In reasonable reliance on Defendant's promise and other
15 actions, on November 12, 2007, three days prior to Aspen's
16 November 15, 2007 deadline, Plaintiff submitted a proposal for a
17 new casebook to Aspen.

18 95. After reviewing Plaintiff's new casebook proposal, Aspen
19 agreed to publish a new casebook by Plaintiff on condition that
20 Defendant and he execute a formal memorialization of the
21 Separation Agreement.

22 96. Defendant should reasonably have expected her promise
23 and other actions to induce Plaintiff's reliance on her promise
24 as described in Paragraphs 93 and 94.

25 97. Plaintiff and Defendant have already lost the
26 opportunity to publish future editions of the Casebook with Aspen
27 due to Defendant's delays and other contractual breaches.

28

1 98. Plaintiff and Defendant have already lost the
2 opportunities to accept Aspen's November 9, 2007 offers to
3 publish new separate criminal law casebooks with Aspen due to
4 Defendant's failure to honor her promise to separate from
5 Plaintiff as an author and divide the Casebook's materials
6 between Plaintiff and Defendant.
7

8 99. Defendant must be estopped by this Court from failing to
9 honor her promise to separate from Plaintiff as an author and
10 divide the Casebook's materials between Plaintiff and Defendant
11 in order to avoid the further injustice of Plaintiff losing all
12 future opportunity to publish and earn royalties on the
13 approximately 500 pages of materials he spent several years
14 independently selecting, editing, and writing, and the teacher's
15 manual he wrote.
16

17 WHEREFORE, Plaintiff respectfully requests judgment against
18 Defendant estopping her from failing to fulfill her promise to
19 separate from Plaintiff as an author and divide the Casebook's
20 materials between Plaintiff and Defendant as described in the
21 Separation Agreement.
22

23 **COUNT VI**

24 **ESTOPPEL BY ACQUIESCENCE**

25 100. Plaintiff incorporates by reference Paragraphs 1
26 through 99, above.

27 101. Between May of 2007 and November 12, 2007, Defendant
28 made numerous statements and engaged in numerous acts indicating

1 to both Plaintiff and Aspen that Plaintiff and Defendant would
2 not be working together on a second edition of the Casebook, but
3 would instead separate as authors and divide the Casebook's
4 materials.

5 102. On September 19, 2007, for example, Defendant stated
6 in an email to Plaintiff and to Aspen "I hope to return to the
7 book division proposal in two to three weeks."

8 103. On November 2, 2007, Aspen stated to Defendant and
9 Plaintiff in an email that, following phone conversations with
10 both Defendant and Plaintiff, "it is clear that the two of you
11 will not be working together on a second edition of your criminal
12 law casebook."

13 104. Prior to November 12, 2007, Defendant made no statement
14 to Plaintiff and took no action contrary to her statements and
15 acts that led Plaintiff and Aspen to conclude that Defendant and
16 Plaintiff "will not be working together on a second edition of
17 your criminal law casebook," and thus Defendant acquiesced to the
18 statement's accuracy.

19 105. Defendant's failure to deny in timely fashion the
20 accuracy of the statement in Aspen's November 2, 2007 email
21 served as an adoption by Defendant of the statement's accuracy.

22 106. Defendant's acquiescence, silence, and other actions
23 led Plaintiff reasonably to believe that Defendant would separate
24 from him as an author and divide the Casebook's materials between
25 Plaintiff and Defendant.
26
27
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1 107. Defendant knew that Aspen had offered Plaintiff a
2 contract for a new casebook and that this offer was conditioned
3 on Plaintiff submitting a new book proposal to Aspen by
4 November 15, 2007.

5 108. In reasonable reliance on Defendant's acquiescence,
6 silence, and other actions, on November 12, 2007, three days
7 prior to Aspen's November 15, 2007 deadline, Plaintiff submitted
8 a proposal for a new casebook to Aspen.

9 109. After reviewing Plaintiff's new casebook proposal,
10 Aspen agreed to publish a new casebook by Plaintiff on condition
11 that Defendant and he execute a formal memorialization of the
12 Separation Agreement.

13 110. On November 23, 2007, Defendant reversed her position
14 and since that date has demanded that Plaintiff work together
15 with Defendant on a second edition of the Casebook.

16 111. Defendant should reasonably have expected her
17 acquiescence, silence, and actions to induce Plaintiff's reliance
18 on her statements and acts that led Plaintiff and Aspen to
19 conclude that Defendant and Plaintiff "will not be working
20 together on a second edition of your criminal law casebook."

21 112. Defendant's November 23, 2007 change of position caused
22 Plaintiff and Defendant to lose the opportunities to accept
23 Aspen's November 9, 2007 offers to publish new separate criminal
24 law casebooks with Aspen.

1 113. Defendant must be estopped by this Court from changing
2 her position and failing to separate from Plaintiff as an author
3 and divide the Casebook's materials between Plaintiff and
4 Defendant in order to avoid the further injustice of Plaintiff
5 losing all future opportunity to publish and earn royalties on
6 the approximately 500 pages of materials he spent several years
7 independently selecting, editing, and writing and the teacher's
8 manual he wrote.

10 WHEREFORE, Plaintiff respectfully requests judgment against
11 Defendant estopping her from changing her position and failing to
12 separate from Plaintiff as an author and divide the Casebook's
13 materials between Plaintiff and Defendant as described in the
14 Separation Agreement.

15 **COUNT VII**

16 **BREACH OF THE ASPEN AGREEMENT - DAMAGES**

17
18 114. Plaintiff incorporates by reference Paragraphs 1
19 through 113, above.

20 115. Plaintiff is either a direct beneficiary or a third-
21 party beneficiary of the Aspen Agreement as it applied to
22 Defendant.

23 116. Defendant materially breached the Aspen Agreement in
24 regard to publication of the Casebook as set forth in Paragraphs
25 5 through 21, above, and in regard to publication of the
26 teacher's manuals as set forth in Paragraphs 22 through 36,
27 above.
28

1 117. Plaintiff demanded that Defendant fulfill her
2 obligations under the Aspen Agreement but Defendant Bloch failed
3 and refused to do so.

4 118. Plaintiff duly performed all terms and conditions of
5 the Aspen Agreement.

6 119. Aspen duly performed all terms and conditions of the
7 Aspen Agreement.

8 120. Defendant's delays and other breaches of the Aspen
9 Agreement caused publication of the Casebook to be delayed for
10 over a year and Plaintiff thereby lost the opportunity to earn
11 royalties from sales of the Casebook during the 2004-2005
12 academic year.

13 121. Defendant's delays and other contractual breaches
14 concerning the teacher's manual caused the published version of
15 the teacher's manuals to be delayed for nearly two years and,
16 thus, unavailable in 2005 to potential adopters of the Casebook
17 in making their decision whether to adopt the Casebook,
18 unavailable for Aspen's sales staff to use in marketing the
19 Casebook for the 2005-2006 academic year, and unavailable for use
20 by teachers who adopted the Casebook during the 2005-2006
21 academic year, thereby damaging marketing and sales of the
22 Casebook and reducing the royalties earned by Plaintiff from
23 sales of the Casebook.

24 122. Defendant's delays and other breaches of the Aspen
25 Agreement caused Aspen to decide not to publish future revised
26
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1 editions of the Casebook and consequently Plaintiff has lost the
2 opportunity to earn royalties on future revised editions of the
3 Casebook.

4 WHEREFORE, Plaintiff respectfully requests judgment in his
5 favor against Defendant for her breaches of the Aspen Agreement
6 and granting him damages in an amount in excess of \$75,000, for
7 interest from the time of judgment, costs, and for such further
8 relief as this Court deems just.
9

10 **COUNT VIII**

11 **BREACH OF SEPARATION AGREEMENT - DAMAGES**

12 123. Plaintiff McMunigal incorporates by reference
13 Paragraphs 1 through 122, above.

14 124. As a result of Defendant's repudiation and breach of
15 the Separation Agreement, Aspen will not contract with Plaintiff
16 McMunigal to publish a new criminal law casebook using the
17 materials described in Part Three of the Separation Agreement.

18 125. As a result of Defendant's repudiation of the
19 Separation Agreement, Plaintiff has lost the opportunity to earn
20 future royalties through publication of a new casebook with Aspen
21 in an amount in excess of \$75,000 over the life of such a new
22 casebook and future revised editions.
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1 WHEREFORE, Plaintiff respectfully requests judgment in his
2 favor against Defendant for her breaches of the Separation
3 Agreement granting damages in an amount in excess of \$75,000, for
4 interest from the time of judgment, costs, and for such further
5 relief as this Court deems just.
6

7 PRAYER

8 WHEREFORE Plaintiff requests that this Court grant judgment
9 on his behalf against Defendant as follows:

10 Count I-- Declare that Plaintiff holds sole copyright to the
11 materials described in Part Three of the Separation Agreement.

12 Count II -- Partition the Casebook's copyright between
13 Plaintiff and Defendant by ordering Defendant to execute the
14 Separation Agreement.

15 Count III--Declare that the Separation Agreement is a
16 legally enforceable contract and that Plaintiff holds sole
17 copyright to the materials described in Part Three of the
18 Separation Agreement.
19

20 Count IV--Order Defendant specifically to perform under the
21 Separation Agreement.

22 Count V--Find that Defendant is promissory estopped from
23 failing to honor the Separation Agreement.

24 Count VI--Find that Defendant is estopped by her
25 acquiescence, silence, and other actions from failing to honor
26 the Separation Agreement.
27
28

1 Count VII—Award money damages to Plaintiff in an amount in
2 excess of \$75,000 to be determined at trial for losses sustained
3 by Plaintiff due to Defendant's breach of the Aspen Agreement,
4 plus interest, costs, and such other and further relief as may be
5 just.

6 Count VIII— Award money damages to Plaintiff in an amount in
7 excess of \$75,000 to be determined at trial for the losses
8 sustained by Plaintiff due to Defendant's breach of the
9 Separation Agreement, plus interest, costs, and such other and
10 further relief as may be just.

11 **AND** Plaintiff requests that the court order Defendant to pay
12 the costs incurred in prosecuting all these Counts and attorney
13 fees incurred in prosecuting Count I.

14 DATED: June 18, 2010

LAW OFFICE OF MATTHEW B. PAVONE

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19 By: 

20 Matthew B. Pavone
21 Attorney for Plaintiff
22 KEVIN C. MCMUNIGAL
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